

Memorandum



Subject

United States v. One Executive Tools Spiral Notebook,
et al., 20000V01108

Date

October 19, 2000

To

Igou M. Allbray

From

David L. Goldberg *DLG*

This civil file was opened to handle the Government's treatment of evidence seized by the United States Postal Service in 1989 from Michael Bertolini, and is ready to be closed. For the reasons set forth below, I seek permission to transfer the closed file to the National Archives, pursuant to 44 U.S.C. § 2107, on the grounds that the contents of this file have sufficient historical or other value to warrant preservation by the Government. The reasons for this request are set forth below.

Factual Background.

In October 1989, the Government arrested Michael Bertolini for violating federal tax laws.¹ At the time of his arrest, United States Postal Service agents seized an Executive Tools Spiral Notebook (the "Notebook") from Bertolini's residence.² The Government holds title to the Notebook pursuant to administrative abandonment proceedings completed by the United States Postal Service on October 16, 2000.³

The Notebook (the contents of which have never been publicly disclosed) has been the subject of persistent public interest. This public interest derives from press reports that the Notebook contains evidence that Peter E. Rose, a former Major League baseball player and manager, and a close associate of Bertolini, gambled large sums of money on professional baseball while serving as a player-manager for the Cincinnati Reds baseball team in 1986. Rose has vigorously and publicly denied these reports.

Public interest in the contents of the Notebook has not dissipated with the passage of time. In November 1999, USA Today published a cover story concerning Rose's alleged gambling.⁴

¹ Bertolini has pled guilty and served a prison sentence. United States v. Bertolini, 94-CR-1108 (E.D.N.Y.). There are no pending criminal proceedings.

² A copy of the Notebook is attached as Exhibit 1.

³ A copy of the Notice of Abandonment is attached as Exhibit 2.

⁴ "Rose Hoping For Support In Numbers," USA Today, Nov. 30, 1999 (copy attached as Exhibit 3).

FOIA
(b)(3);
(b)(6);
(b)(7)(C)

The USA Today story discusses, in detail, the suspected contents of the Notebook. See Exh. 2, p. 5. In December 1999, a Gallup Organization poll found that 30 percent of those surveyed believed that Rose never gambled on baseball (up from 18 percent in 1989) and 74 percent believed that Rose should be elected to The Baseball Hall of Fame (up from 56 percent in 1989).⁵ Searches of news databases reflect over 10,000 references to Pete Rose in the national media in 1999 and 2000 alone.

In sum, there is widespread and persistent public interest in the contents of the Notebook and the factual predicates for its preservation by the Government are well-established.

Legal Basis For Transfer.

Title 44, Section 2107(1) of the United States Code, 44 U.S.C. § 2107(1) provides, inter alia, that:

“When it appears to the Archivist [of the United States] to be in the public interest, he may (1) accept for deposit with the National Archives of the United States the records of a Federal agency. . . . determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government[.]”

See 44 U.S.C. § 2107(1). In April 2000, Bernard Berglund, DOJ's attorney-liaison to the National Archives, advised that it was highly likely that the Archivist would accept this matter for inclusion in the National Archives.

FOIA/PA Considerations.

The Privacy Act, 5 U.S.C. § 552a, does not prohibit the transfer of this file to the National Archives. In relevant part, the Privacy Act provides that:

[N]o agency shall disclose any record which is contained in a system of records by any means of communication, to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . (6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value.

See 5 U.S.C. § 552a(b)(6) (emphasis supplied). Section 552a(b)(6) thus provides a “safe harbor” to the disclosure of this case file to the National Archives.

⁵ “Three of Four Americans Want to See Rose in Cooperstown,” Gallup Organization, Dec. 1, 1999 (copy attached as Exhibit 4).

Similarly, the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), does not prohibit transfer of this file to the National Archives. FOIA requires the disclosure, upon request, of information within an agency's custody, unless the requested information falls within one of nine listed exceptions. See 5 U.S.C. §§ 552(a)(3); 552(b)(1)-(9). Under no circumstances has FOIA been interpreted to require agencies to withhold information, and the Government has the discretion to disclose information within its custody, provided that it is not prohibited from doing so by another statute, such as the Privacy Act. CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.D.C. 1987). This principle, also known as "discretionary disclosure," applies even in cases where the Government previously held that agency information was exempt from disclosure under one of the FOIA exemptions. CNA Financial, 830 F.2d at 1134, n.1 (disclosure may "be grounded either in [agency's] view that none of the FOIA exemptions apply, in which case disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data falls within one or more of the statutory exemptions"). In other words, an agency may refuse to make a disclosure under FOIA, on the grounds that the requested information is exempt, and later disclose the requested information in the exercise of its discretion. Id.

The principle of discretionary disclosure is important here because DOJ previously denied FOIA requests for the Notebook served by The New York Times, Sports Illustrated, and other media sources in 1995 and 1996. The New York Times appealed one such denial to DOJ's Office of Information and Privacy, which upheld the denial.⁶ DOJ cited 5 U.S.C. § 552(b)(7)(c), which exempts from disclosure records which constitute "an unwarranted invasion of personal privacy," in support of its decision, and held that discretionary disclosure of the Notebook was "not appropriate." See Exh. 3.

DOJ's refusal to authorize discretionary disclosure of the Notebook to the media does not prohibit discretionary disclosure to the National Archives, since the continued preservation of the Notebook is wholly unlike the discretionary release of the Notebook to the media. However, insofar as the Office of Information and Privacy has previously ruled on the aforementioned FOIA requests, you may wish to consider whether to solicit its views on disclosure to the National Archives.

Alternatives to Transfer.

As stated, we hold title to the Notebook and may dispose of it as permitted by law. Accordingly, we may elect to warehouse the file, with a recommendation for retention by the National Archives 30 years after close of this case.⁷ This course is not recommended because of the widespread public interest in the matters contained herein, as discussed above.

Alternately, we may elect to sell the Notebook at public sale pursuant to United States Postal Service regulations, or donate the Notebook to a non-Governmental museum or archives, such as the Baseball Hall of Fame. See 39 C.F.R. § 233.7(i)(iii). This course is not recommended in light of DOJ's previous refusal to authorize discretionary disclosure of the Notebook to the media.

⁶ See Letter from Richard L. Huff, Co-Director, DOJ Office of Information and Privacy, to Adam Liptak, dated (illegible). A copy of this letter is attached as Exhibit 5.

⁷ See Form USA 207 (copy attached as Exhibit 6).

Conclusion.

For the reasons set forth above, permission to transfer the above-referenced file to the National Archives, pursuant to 44 U.S.C. § 2107, on the grounds that the contents of this file have sufficient historical or other value to warrant preservation by the Government, is requested.

D.L.G.

Approved by I.M.A.

2/20/01 -

Paul Coley